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In the Supreme Court of the United States.

OCTOBER TERM, 1913.

AMBROSIO APAPAS, CORNELIO LUBO, FRANCISCO LUBO, PABLINO LUBO, PIO LUBO, and LEONICIO LUGO, plaintiffs in error,
v.
THE UNITED STATES.
No. 746.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Plaintiffs in error (hereinafter called defendants) were convicted of murder in the second degree (Rec. 30), and sentenced to 10 years' imprisonment each.

Defendants are Mission Indians, members of the Cahuilla Tribe, and resided on the Cahuilla Indian Reservation in southern California (R. 60). Stanley, their victim, was a white man and was superintendent of the reservation. On May 2, 1912, he was shot by Apapas, and died the same day. The other defendants were principals in the second degree, the claim of the Government being that the homicide was the result of a conspiracy among the Indians.

The offense occurred on the Indian reservation, and jurisdiction was taken by the United States

court under section 328,[1] Penal Code of March 4, 1909 (35 Stat., 1151). See also sections 273, 275, 330, and 332 (R. 237). The case is not reported below.

The case is brought to this court on the claim that the identification of the pistol by Apapas was received in evidence in violation of his rights under the fifth amendment.

Inasmuch as this statement was received only against Apapas, it can not avail the other defendants, and apparently they have no right in this court.

Defendants also questioned the jurisdiction of the trial court, but that point is not certified, so that it does not give jurisdiction here.

Defendants raise numerous points on questions of evidence, instructions to the jury, etc. They will be stated hereafter.

Ten Indians were indicted. Six were convicted—Apapas, Cornelio Lubo, Francisco Lubo, Pablino Lubo, Pio Lubo, and Leonicio Lugo. Those acquitted were Charlie Arenas, Patrick Casero, Agapito Lubo, and Santos Lubo.

The Cahuilla Reservation was established by Executive order of December 27, 1875 (1 Kappler's Laws and Treaties, p. 820).

The tribal form of government is still maintained (R. 146–154). The Indians have a captain and a tribal judge elected by themselves, but appointed by the Indian Office (69).

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[1]Appendix.

Prior to July 1, 1911, the reservation was in charge of Swayne. On that day it was placed in charge of Stanley, then also superintendent of the Soboba Reservation, some 40 miles north (59).

In July, 1910, Lugo had received a commission as captain of the tribe from Superintendent Swayne, but the commission was revoked the same year (61).

Friction followed between Swayne and the Indians and evidently resulted in Swayne's transfer, though Lugo was told in a letter from Assistant Commissioner Hauke (Oct. 6, 1911, R. 61) that he should not understand that the transfer was because of Lugo's complaints.

The Indians apparently concluded not to accept Stanley as superintendent, but to secure his transfer as well. In the letter last mentioned Lugo was told that Mr. Stanley had expressed the belief that the Indians would be ready to work in unison with him as soon as they understood his duties, and Lugo was advised that the Indians should follow Stanley's directions and work together with him. This letter was transmitted to Lugo in one from Stanley expressing a feeling of good will and asking the Indians to get together and help him to "do things" (62).

On October 25, 1911, Lugo wrote the commissioner of Indian Affairs protesting against Stanley's appointment, complaining that he was arbitrary, tyrannical, violent in temper, and imprisoned an Indian upon the slightest provocation. The letter was supported by affidavits from Indians on the Soboba Reservation. Lugo stated that the Indians asked

only to be allowed to elect their own captains and judges, and to remain on their own land (64).

February 20, 1912, the Commissioner replied that the right of appointing Indian judges and policemen is vested in the Indian Office; that the superintendent was expected to see that only proper persons served as captains, and was justified in withholding a commission from any Indian elected who did not have the proper qualifications. The letter stated that Lugo had been discontented under the former superintendent, and appeared to be no better satisfied now, and admonished him to cease his efforts to create dissatisfaction and unrest among the Indians and to obey the superintendent (68).

Pending the exchange of these letters, Stanley made several visits to Cahuilla, and endeavored to meet the Indians in council, but they refused to meet him, stating that Leonicio Lugo was their captain and would not let them come (Mrs. Stanley, 80, 81). On Stanley's first visit, Lugo said that the Indians would not talk to Stanley until they had received a letter from Washington in answer to one they had written (Adolf Lugo, 122)—evidently referring to Lugo's letter of October 25, 1911.

During the short term of his service, Stanley made perhaps a dozen visits from Soboba to Cahuilla (80), and was always patient and courteous with the Indians (Mrs. Stanley, 76; Stevens, 130).

Some time during the summer of 1911 Patrick Casero (who was acquitted) stated that the Indians did not want Stanley as their superintendent; that

they would not recognize him and would get rid of him just as soon as they did the previous agent (Chambers, 121).

Defendant Francisco Lubo, in 1907 and again in 1908, had visited Stanley's house on the Soboba Reservation and threatened to kill him. After the second visit Francisco was banished from that reservation. He never afterwards spoke to Stanley (Mrs. Stanley, 71–74, 78; Adda A. Light, 81; Arnold Stanley, 82).

It was understood among the Indians that Stanley, whose headquarters were at the Soboba Reservation, was coming to Cahuilla about the 1st of May for the purpose of branding some bulls left with the Indians by a former superintendent. Though the animals belonged to the Government, the Indians had come to regard them as their own and objected to the branding, fearing that it might mean the taking away from them of the calves.

The theory of the prosecution was that the Indians had determined to compel the recognition of Lugo as their captain, and to prevent the branding of the animals, and that in order to accomplish these things they had conspired to drive Stanley away as superintendent or to inflict great bodily harm on him, or death, if necessary; and that the killing of Stanley was the natural result of this conspiracy.

On May 1, 1912, Stanley, accompanied by Pederson, a white farmer, and Celso Serrano, an Indian forest guard, came from Soboba to Cahuilla, arriving about 4 o'clock (110).

Several miles before reaching Cahuilla, they stopped to talk with some men who were repairing the road. Defendant Pablino Lubo was among the workmen. Contreras, another workman, testified that Pablino had said during the morning he understood Stanley was coming to brand the calves and colts and bulls and "If he comes up, we are going to kill him." After Stanley had gone by, the witness said, "Pablino was gone, just as soon as he seen Stanley pass" (94).

The day was a fiesta with the Indians which they celebrated as a decoration day. The afternoon was spent at the cemetery, and in the evening there was a supper and dance at Juan Costa's house, the dance lasting all night. They danced the old-time war dance (100).

Stanley wanted to see two of the Indians, Cornelio Lubo and Adolph Lugo. He sent word to them to this effect by John Largo, the Indian policeman, and the message was delivered at the dance. The Indians were told that Stanley desired to see them at 9 o'clock the next morning (100, 123).

That same evening Stanley and Largo talked with defendant Pablino Lubo at the latter's house. Pablino claimed that some money was due him from the Government, and called Stanley a liar when the latter said he had no such money for Pablino, but would write to Washington about it (Largo, 234, 235).

Leonicio Lugo was still treated by the Indians as their captain, and was their active leader.

He was present at the dance, as were all the defendants, with the possible exception of Apapas (100).

Cornelio Lubo early the next morning told Leonicio Lugo of his summons from Stanley. Lugo arranged to go with Lubo and asked Ignacio and Juan Costa to go also.

That morning about 28 of the Indians, including most of the defendants, were gathered around Juan Costa's barn (101), and all were present in the school room during the council immediately preceding the killing.

Leonicio Lugo was at the head of the Indians and conducted the negotiations on their part. The band first called at Stevens's house; Lugo asked to see Stanley. They all adjourned to the schoolhouse, and there Lugo appointed the interpreter for the Indians, and was their active manager.

Lugo first brought up the question of his leadership by demanding to know why Stanley wanted to see Cornelio Lubo, and when Stanley refused to recognize him in the matter reasserted his captaincy and said Stanley could talk to Lubo only through him. Lugo then brought up the question of branding the cattle, and called upon the different Indians interested in the matter to express their views. When this also was decided against the Indians, and after Stanley had spoken about some other matters, Lugo closed the meeting and ordered the Indians to go. His order to Cornelio Lubo (225) was in direct defiance of Stanley.

Arguments having failed with Stanley, force was the only way left to the Indians to accomplish their purpose.

The details of the killing are told by five Government witnesses, three of them Indians—Largo, the policeman; Serrano, the forest guard; and Adolf Lugo, a nephew of defendant Leonicio Lugo (129). The white men were Stevens, the teacher, and Pederson, the farmer.

Among the buildings at the reservation were the teacher's house and the schoolhouse. Stevens occupied the former, and Stanley spent the night with him. About 9 o'clock the next morning the Indians called at the teacher's house to see Stanley and they all adjourned to the schoolhouse. Stanley and the two white men and Serrano were present throughout; Largo and Adolf Lugo came in after the meeting had begun.

Leonicio Lugo was the spokesman for the Indians, and their interpreter was Ignacio Costa (101).

The versions of the Government witnesses—that of the Indians who heard the discussion in the Indian tongue, and that of the white men who heard the discussion in their own language—is in substance the same, except that the Indians tell several important statements made in their own language which were not translated.

The interview was opened by a demand from Leonicio Lugo to know what Stanley wanted with Cornelio Lubo; Stanley replied that he could not recognize Leonicio, but would himself talk with

Cornelio. Leonicio replied that he was the captain and leader of the people there, and if anybody wanted any business with his people they would have it through him. (Serrano, 111, 112; Stevens, 131; Pederson, 138; L. Lugo, 223.)

There followed a long talk about branding the bulls and the ownership of the colts and calves, the appointment of Serrano as policeman, rules relating to fences, and other matters.

The Indians said they understood Stanley was coming to brand the Government bulls. He replied that was correct. The Government witnesses agreed that the Indians replied that if Stanley did brand the bulls he would have to take them off the reservation, and Stanley replied he could not do that without directions from Washington. (Largo, 102; Serrano, 112; Lugo, 123; Stevens, 132; Pederson, 138.)

During the conversation Charlie Arenas and Agapito Lubo (who were acquitted) said something to the interpreter about taking him outside, and Pio Lubo (who was convicted) said, "If you fellows are afraid of Mr. Stanley, I will drive him out by the hair." (Largo, 103.)

Pio said, "You fellows are talking too much and going too far. *You must do what you said this morning.* Let us drag him out by the hair. I will do it myself." (Serrano, 112; Adolf Lugo, 124.)

Apapas, who was present (112), displaye' such an antagonistic attitude toward Stanley that it attracted Pederson's attention (143).

These remarks were not interpreted to the whites. Finally Leonicio, who had conducted the greater part of the conversation, called upon various ones who desired to speak, and then said let us go out (A. Lugo, 124). Defendant Leonicio Lugo himself testified that he told Cornelio Lubo to go out (225).

Thereupon, as Cornelio Lubo started out Stanley said—"Come here, I want to see you and talk to you." Cornelio simply turned his head back and went on; Stanley sent the policeman, Largo, after him. Largo got to Cornelio before the latter passed out, but Cornelio pushed him back against the door and went on. Stanley then sent Largo out after Cornelio. (Largo, 104, 105; Serrano, 113; Lugo, 124; Stevens, 132; Pederson, 139.)

Largo caught up to Cornelio, took him by the shoulder, and stated that Mr. Stanley wanted him to come back; Cornelio kicked back at Largo, and several of the other defendants caught hold of him. Francisco undertook to draw Largo's gun, and they both struggled for it. Cornelio, Pablino, Pio, Francisco, and others overpowered Largo and threw him to the ground and took the pistol away from him (Largo, 105).

Serrano had started out to assist Largo, but when he got out on the porch saw the latter's predicament. Thereupon Apapas pulled out his gun and pointed it at Serrano; the latter pulled his own and told Apapas to put his up. The two men exchanged shots, Serrano shooting either at the ground or in the air. When Apapas had emptied his own revolver, Fran-

cisco handed him another—evidently that taken from Largo—and Apapas continued to shoot at Serrano. Serrano was hit just below the heart and walked back toward the fence and ran away. (Serrano, 113, 115; Lugo, 124; Stevens, 132.) In the meantime Stanley and Stevens had come out on the porch. Stanley told Serrano not to shoot, but to come into the house (114).

After Ambrosio shot Serrano, he turned and came toward the porch where the white men were standing and shot Stanley. Stanley raised his hand and called to Apapas not to shoot, turned around, and the bullet entered his back. Apapas followed Stanley in the schoolroom and shot again either at Stanley or at Stevens and Pederson, who had run back into the schoolroom. (Lugo, 124, 125; Stevens, 132, 133.) Apapas continued through the schoolhouse, going out the rear door.

The second bullet went through Pederson's coat and was found on the floor; it hit the wall about 3 feet above the floor. (Pederson, 140, 142.)

All the defendants testified, and denied many statements of the Government's witnesses. In brief, their contention was that there was no conspiracy among them to kill or injure Stanley; that after Cornelio Lubo left the schoolroom, Largo followed and fired twice at him, whereupon Apapas took the pistol from him; that at this point Serrano came out and opened fire on Apapas, who fired one shot in return; that Stanley had been hit accidentally by one of the shots.

Apapas, in his own testimony, said nothing about the shooting, but contented himself with denying that he was present at the dance the night before, or owned a revolver (230).

After the affair was over a number of the Indians, including Francisco Lubo, started for Riverside. Leonicio Lugo said he was going to surrender Apapas for shooting Serrano, though he admitted that Serrano had not returned to the reservation, and he did not know whether he was hurt or not (228).

On the way they were met by the sheriff, who took Apapas from them. The Indians continued to Riverside, and there Lugo obtained from a justice of the peace a warrant charging Largo and Serrano with assault with a dangerous weapon (229, 230.)

The Government contends from these facts—

I. That the trial court had jurisdiction; that the question is not certified, and hence can not be used to give jurisdiction here.

II. The receipt of Apapas's identification of the pistol did not involve the application of the Constitution; the evidence was properly admitted.

III. In any event, the court has no jurisdiction as to the defendants other than Apapas.

IV. The rulings of the court below on questions of evidence, instructions to the jury, etc., were correct.

(*a*) The letters between the Indian Office and Leonicio Lugo were admissible.

(*b*) There was sufficient evidence of the guilt of the other defendants to justify leaving that question to the jury.

(*c*) The charge was correct.

(*d*) The refusal to grant a new trial can not be reviewed here.

(*e*) The district attorney was not guilty of misconduct.

ARGUMENT.

JURISDICTIONAL QUESTIONS.

Jurisdiction here can be claimed, if at all, only on the ground that the trial court lacked jurisdiction, or that the application of the Constitution is involved. (Sec. 238, Judicial Code.)

I.

That the trial court had jurisdiction is settled by prior decisions here; the question is not certified and can not be used as the basis of jurisdiction.

A. *The question is not certified.*

This clause of section 238 reads:

> In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

In *Chappell* v. *United States*, 160 U. S., 499, 507, the court said of this clause:

> In order to bring a case within the first class, not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to this court. If both a question of jurisdiction and other questions

> were before the court below, and a writ of error is allowed in the usual and general form to review its judgment, without certifying or specifying the question of jurisdiction, this court can not take jurisdiction under this clause of the statute.

The present writ of error is in the usual and general form (1), and does not certify or specify the question of jurisdiction. From the petition for the writ (25) and assignment of errors (251), it appears that defendants seek to review some 100 errors alleged to have been committed during the trial.

B. *The defendants were tribal Indians, and within the jurisdiction of the Federal courts.*

The contrary is argued on the ground that, by virtue of the treaty of Guadalupe-Hidalgo, by which California was acquired from Mexico, the defendants or their ancestors became citizens of the United States, and upon the admission of California to statehood became citizens of that State, and hence beyond the jurisdiction of the United States.

These arguments are immaterial.

1. The precise question was decided in *United States* v. *Sandoval*, 231 U. S. 39. That was a prosecution for introducing liquor into an Indian pueblo in New Mexico. It was there argued that the defendant was a citizen and hence beyond the jurisdiction of the United States. After stating that it was an open question whether the Indians had become citizens of the United States (39), the court held that the question was immaterial (48), "because citizenship is not in itself an obstacle to the exercise by Congress of its

power to enact laws for the benefit and protection of tribal Indians as a dependent people. (*Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 308; *United States* v. *Rickert*, 188 U. S. 432, 445; *United States* v. *Celestine*, 215 U. S. 278, 290; *Hallowell* v. *United States*, 221 U. S. 317.)"

2. The defendants are still a dependent people.

The Cahuillas are Mission Indians. Their reservation was created in 1875. (1 Kappler, 820.)

The testimony of the Indians themselves shows that since the treaty of Guadalupe-Hidalgo, the tribal organization has continued and now exists (Rec. 146 to 154).

They have been treated by the Government as requiring special consideration and protection, like other Indian communities. Agents and superintendents have been provided, and schools established. See act of May 17, 1882 (22 Stat., 84), and subsequent Indian appropriation acts. By the act of January 12, 1891 (26 Stat., 712), a commission was established to provide for the relief of the Mission Indians, and special counsel were employed to defend their rights.

No allotments of land have been made to them. (Rep. 1912, Com. of Indian Affairs, 87, under head of Soboba.)

Under these facts, the determination of Congress to continue its guardianship over these Indians is conclusive.

United States v. *Pelice*, [illegible] U. S., 442, 445
United States v. *Sandoval*, 231 U. S., at 46,

quoting from *Tiger* v. *Western Investment Co.*, 221 U. S., 286, 315.

3. The statute takes jurisdiction because of the *place* in which the offense is committed—"within the limits of an Indian reservation in any State." (Sec. 328 Penal Code.)

Sections of the Revised Statutes taking jurisdiction of white citizens for murder of an Indian committed on an Indian reservation were sustained in *Donnelly* v. *United States* (228 U. S., 270), over an objection similar to that here. The principle is the same. (See also *United States* v. *Pelican*, *supra*.)

Kagama v. *United States* (118 U. S., 375), in which the validity of the present statute was sustained, arose in California. There was no suggestion that citizenship of Indians deprived the Federal courts of jurisdiction.

4. The question having been put at rest by prior decisions of this court, could not, even had it been properly certified, serve as the foundation for the present writ.

Rakes v. *United States*, 212 U. S., 55; *Kaufman* v. *Smith*, 216 U. S., 610.

II.

The receipt in evidence of Apapas's statement that he had seen the gun with which the shooting was done does not involve the application of the Constitution, nor was it error.

Defendants' claim now is that the identification occurred while Apapas was under arrest, and therefore it was involuntary.

The Government contends not only that the statement was voluntary, but that the objection as made in the trial court does not raise the constitutional objection.

Three witnesses testified on this point—Wilson, the sheriff (53); Nelson, his deputy (57); and Durlin, deputy marshal (98).

May 2 the sheriff went to the reservation, but not finding Apapas, started back to Riverside and met two teams of Indians. He asked if they came from Riverside and where the Indian was that shot Stanley. Leonicio Lugo pointed out Apapas, whom the sheriff took to Riverside and locked up (53).

Next morning Leonicio Lugo brought a gun to the sheriff as the one Apapas shot Stanley with. This statement was not offered against Apapas (54).

On May 6, in the sheriff's office, in the presence of the latter, Nelson, Durlin, Leonicio Lugo, and Gabe Costa, an interpreter, the gun was shown to Apapas. The conversation took place through Costa (54). Wilson testified that Durlin gave the gun to Costa to ask if it was the gun he shot Stanley with, that no one offered Apapas any promises or immunity for talking; that there was no prior conversation with Apapas, that no gestures were used toward him, that Apapas was standing free and alone and unshackled in the room, and that Apapas answered the question in the affirmative (54, 55). It was objected that the interpreter should be called to testify to show what inducements had been held out. The

district attorney said he would not call Costa because the latter was then appearing in court as the interpreter for the defendants, but if they wished to call Costa, he would withdraw the present witness. The court held the sheriff might testify without the interpreter being called, and witness was turned over for cross-examination. Some unreported discussion ensued, but the defense apparently did not cross-examine on this point (55). Witness then said that Apapas bowed his head in answer to the interpreter's question (55, 56).

Deputy Nelson testified that Apapas, through the interpreter Costa, answered yes to Durlin's question. This was objected to as the statement of the interpreter, and therefore hearsay (58).

The next day the court concluded that the objection because of hearsay was good, and directed the jury to disregard the testimony of the officers as to conversations had with the defendants through an interpreter (59).

Later in the trial Deputy Marshal Durlin, testifying about the same conversation, said the gun was shown to Apapas and witness asked if he ever saw that gun before (98).

Objection was made "that no proper foundation was laid for a confession as there is no evidence to show that there was any were not inducement to immunity offered." Objection was overruled, and witness continued that Apapas answered "Si," which is the Spanish for yes, and made a motion toward the gun (98, 99).

It is the last testimony which the defendant now relies upon as raising a question involving the application of the fifth amendment of the Constitution.

A. *This objection does not involve the construction or application of the Constitution.*

It is admitted by the Government that an involuntary confession is inadmissible, and there is no dispute as to what is an involuntary confession. But Apapas did not assert that his statement was involuntary and therefore inadmissible. He merely objected that the Government at the time of its offer had not shown that his statement was voluntary.

The objection therefore involves only a question of evidence—the burden of proof. There are many different rulings upon this point. In a few jurisdictions it is held that a confession is *prima facie* admissible, and it is incumbent upon the defendant to show that improper inducement existed. *Commonwealth* v. *Sego*, 125 Mass., 213; *Rufer* v. *State*, 25 Ohio St., 464, 469. Prof. Wigmore says this is the practical and natural rule. 1 Wigmore, Evidence, sec. 860. But in most American jurisdictions the rule is that the prosecution in offering the confession must show that it was voluntary (ibid).

There are several variations of these rules. It is sometimes held that the prosecution must show an absence of inducement, not only from the person to whom the confession was made, but from all other persons. In other cases, the confession is received unless attacked by evidence of improper inducement, in which event the burden of showing it to be voiun-

tary in character devolves upon the prosecution (ibid).

None of these rules affects the application of the Constitution. That instrument protects the defendant from the receipt of an involuntary confession, but when its protection is recognized, the Constitution is not concerned with the method of proving the voluntary character of the confession.

An analogous principle was applied in *Taylor* v. *Taft*, 203 U. S., 461. Jurisdiction was asserted under a clause of the statute authorizing a review in any case in which is drawn in question "the validity of an authority exercised under the United States."

Taylor, who had been removed from a clerkship in the War Department, brought mandamus to compel her reinstatement, claiming that the Civil Service rules had been violated in her dismissal. She did not question the authority of the Secretary of War to remove her if certain required formalities had been complied with, but claimed that her dismissal was illegal, because the civil-service rules had not been observed. It was held that this did not draw in question the validity of the authority exercised under the United States, but merely the construction and application of regulations of the exercise of such authority (464).

So, in the present case, the constitutional right of defendant is admitted and his objection merely asserts that the proper rule of evidence was not applied.

B. *The statement of Apapas was properly received in evidence.*

The evidence clearly showed that the statement was voluntary. As the testimony was finally admitted to the jury, Apapas was merely asked if he had seen the gun before and said yes (98). Nothing was said or done to him which could possibly be construed into a threat or promise. This affirmatively appeared from the testimony of the Government witnesses, and was not disputed by the defense. Leonicio Lugo, who was present, and Apapas himself, both testified; they contradicted the Government's witnesses in other respects, but had not a word to say on this. Moreover, Gabe Costa, the interpreter, was present throughout the trial, but was not called as a witness. Unquestionably, therefore, the testimony of the Government's witnesses was unimpeachable.

It is true that Apapas was in custody when he made the statement. This is the reason now given for arguing that it was involuntary. While this fact is one which will be considered, the law is settled that it is not enough in itself to render a confession involuntary. In *Sparf and Hansen* v. *United States*, 156 U. S. 51, 55, it is said:

> Counsel for the accused insist that there can not be a voluntary statement, a free open confession, while a defendant is confined and in irons under an accusation of having committed a capital offense. We have not been referred to any authority in support of that position. It is true that the fact of a prisoner being in custody at the time he makes a confession is a circumstance not to be overlooked, because it bears upon the inquiry whether the

> confession was voluntarily made or was extorted by threats or violence or made under the influence of fear. But confinement or imprisonment is not in itself sufficient to justify the exclusion of a confession, if it appears to have been voluntary and was not obtained by putting the prisoner in fear or by promises.

To the same effect are *Pierce* v. *United States*, 160 U. S. 355, 357; *Wilson* v. *United States*, 162 U. S. 613, 623; *Bram* v. *United States*, 168 U. S. 532; *Commonwealth* v. *Bond*, 170 Mass. 41; *Commonwealth* v. *Williams*, 171 Mass. 464; *Commonwealth* v. *Devaney*, 181 Mass. 34; *State* v. *Gorham*, 67 Vt. 367; *Roesel* v. *State*, 62 N. J. Law, 216.

Such is the law of California where the present case arose. *People* v. *Ramirez*, 56 Calif. 536.

The cases are collected in 1 Wigmore, Evidence, sec. 851, and in an elaborate note in 18 L. R. A. 796.

Nor does the failure to caution Apapas of his right to refuse to talk render his answer involuntary (1 Ruling Case Law, 569; 18 L. R. A., N. S., 791, cases cited).

Both the arrest and failure to caution are facts which were considered by the trial court. There was ample affirmative evidence showing the voluntary character of the confession, and his judgment will not be interfered with.

The statement was of such slight importance as to hardly justify the name of confession. It was a mere admission that Apapas had seen the pistol before. The fact that Apapas did the shooting, and with that pistol was not denied. Afterwards at least

two defendants identified the pistol as the one taken from Apapas and with which the shooting was done. (Arenas, 207; Cornelio Lubo, 182.)

C. *The question, having been set at rest by prior decisions of this court, does not give jurisdiction.*

Rakes v. *United States* and *Kaufman* v. *Smith*, supra.

III.

Jurisdiction can not be taken as to the defendants other than Apapas on the ground that the application of the Constitution is involved.

Apapas' statement as to the pistol was received only as against him. It is true that this was not mentioned when Durlin testified (99), but the court had previously cautioned the jury with reference to this specific statement (58). And the record is full of similar cautions by the court.

But even if the statement was considered as evidence against them, their constitutional rights were not involved—no one of them was thereby compelled to testify against himself.

It follows that the court is without jurisdiction as to them.

While the specific point does not seem to have been decided, the principle of decisions in civil cases would seem to dispose of it.

Where jurisdiction is asserted on the ground of the amount involved, it is held that appellants having separate claims can not add them to make the jurisdictional amount.

In *Davis* v. *Schwartz*, 155 U. S., at 647, the rule is hus stated:

> The rulings of this court are uniform and consistent to the effect that, where several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, this court has jurisdiction, though the individual claims do none of them exceed the requisite amount, but when the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy, the case will be dismissed as to claims not exceeding $5,000.

While the defendants here were jointly indicted and charged with a joint offense, the conviction and sentence as to each was in legal effect separate and distinct; each was concerned only with his own judgment.

If the ruling of the court involved all, it might furnish a joint ground for review. But the evidence relied on to give jurisdiction was received against one only, and invaded only his constitutional rights. It therefore furnishes no ground of jurisdiction as to the others. It is separate—as though the defendants had received separate trials.

IV.

If this court has jurisdiction, there are certain rulings below on the evidence, instructions and on the motion for a new trial which may be briefly disposed of.

A. *The letters between the Commissioner of Indian Affairs and Superintendent Stanley, on the one hand, and Leonicio Lugo on the other, were properly received.*

These letters were five in number (61 to 70).

The first was from Assistant Commissioner Hauke to Lugo, advising him of Stanley's appointment, and expressing the hope that the Indians would work together with Stanley. It was transmitted to Lugo in a letter of the same character from Stanley (62).

The result of these was a vigorous protest from Lugo to the Commissioner of Indian Affairs against Stanley's appointment. Stanley was accused of being arbitrary and tyrannical in his treatment of the Indians, and affidavits of specific charges were sent with the letter. The letter also stated that the Indians wanted to elect their own captains and judges (64).

This letter was dated October 25, 1911. It will be remembered that the Indians refused to recognize Stanley pending the receipt of an answer (130).

Finally, the answer came. It was dated February 20, 1912, and was an admonition to Lugo to cease his complaints and work with Stanley. He was also told that the right to appoint the captains and judges was in the Indian Office, and that they must be satisfactory to the superintendent (68).

The visit of Stanley in May was apparently his next visit after the receipt of this letter.

The entire correspondence was highly important as showing the relations of Lugo toward Stanley, and was received for that purpose, and as against Lugo only (68, 70). The jury was expressly cautioned that the letters were not evidence of the truth of any statements made in them (71).

The evidence was clearly admissible in the discretion of the court. The theory was that the defendants had determined to get rid of Stanley as superintendent. These letters showed an attempt to do that by Lugo; that the Indian Office would probably listen to no further complaints by Lugo, and any relief would have to come from his own acts. It also showed the real reason for Lugo's complaint—his desire to remain as captain.

B. *There was sufficient evidence of the guilt of the defendants other than Apapas.*

The defendants moved to strike out all the evidence relating to the other defendants on the ground that a conspiracy had not been shown, and the motion was denied (145).

The motion is now presented as if it were one to direct a verdict for those defendants.

These defendants were charged as principals in the second degree. The theory of the Government was that they had agreed to get rid of Stanley, and to kill if necessary.

The evidence detailed above supports the verdict.

To briefly recapitulate as to the defendants who were convicted:

Leonicio Lugo for years had been the leader of the Indians. The revocation of his commission as captain had caused the friction resulting in the former superintendent's removal. He had attempted to secure Stanley's removal also, but had failed; and all hope of relief from the Indian Office was gone. But Lugo had recently been reelected by his tribe (162)

and intended that his authority should be admitted. There was otherwise no occasion for him to interfere with Stanley's desire to see Cornelio Lubo. But to his mind that was a good opportunity to force the issue, and let Stanley see he could do nothing as superintendent except through Lugo. Lugo's control over the Indians during the day was complete. He led the band to the teacher's house and to the schoolhouse, opened the council, conducted it throughout, and terminated the meeting by directing Cornelio Lubo to leave, in defiance of Stanley's orders.

His attempts to secure recognition otherwise having failed, no course but violence was left. And when that violence did occur, the jury were justified in finding him party to it.

Pablino Lubo the day before had said they were going to kill Stanley if he tried to brand the cattle, and had a grievance because of money claimed to be due him (94, 234).

Pio Lubo at the hearing in the schoolhouse accused the others of faint-heartedness, insisted that their plan be executed, and himself wanted to drag Stanley out by the hair (103, 112, 124).

Francisco Lubo had threatened to kill Stanley years before, and would not speak to him. He took from Largo and handed to Apapas the pistol with which the latter killed Stanley (71–4, 8; 105, 114).

Cornelio had acted throughout under Lugo's instructions. At the latter's bidding he refused to remain to talk to Stanley, and forcibly opposed the attempt of the policeman Largo to get him to return.

He and all the other defendants except Lugo had united in overpowering the policeman Largo and in taking his pistol from him.

Apapas had assisted in overpowering Largo, and taking his pistol, had severely wounded Serrano, who had attempted to come to Largo's assistance, and then had wantonly shot Stanley and even followed him into the schoolhouse, where he fired a second time.

Clearly the jury were justified in believing that the six Indians who were convicted were responsible for the killing, and had seized the attempt of Largo to detain Cornelio Lugo as a mere pretext to carry out their design.

C. *The court gave in its charge the substance of the rejected prayer of the defendants.*

This clearly appears from a reading of the rejected instruction (261) and the charge, where the court said:

> I will further add here, gentlemen, though somewhat out of order, that if you find from the testimony that the policeman Largo made an assault on the defendant Cornelio Lubo with a revolver, and attempted to shoot him, the defendant Lubo had a legal right to resist the attack and the other defendants present had a like right to seize upon and disarm the assailant, using such force as was deemed reasonably necessary for that purpose. Of course, whether the policeman Largo made a felonious assault on this defendant, as claimed by the defense, or whether he was *seized* upon, assaulted and disarmed, as claimed

by the Government, is a question of fact for your consideration (241).

D. *The refusal to grant a new trial can not be reviewed here.*

It was stipulated, upon the motion for a new trial, that while the jury were considering their verdict a copy of the Los Angeles Times, containing an article entitled "The fate of Cahuilla Bucks in doubt over night," was in the jury room and read by several jurors; also that during the trial several of the jurors talked to one Swayne about a matter entirely unconnected with the case (247, 248). The trial court considered the evidence and denied the motion for a new trial.

1. The matter was in the discretion of the lower court and that discretion can not be reviewed here. (*Holmgren* v. *United States*, 217 U. S., 521; *Mattox* v. *United States*, 146 U. S., 147.)

2. Even were the question open, the decision of the court below should be affirmed.

The newspaper article was a statement of the fact that the case had been submitted to the jury in the morning and they had not agreed some six hours later. The writer then hazarded the belief that one of the defendants would be found guilty, but that there was great doubt about the ability of the jury to agree on the others, with the possible exception of two of them. There was also a reference to other pending indictments.

The article was colorless; was a fair statement of the facts which it purported to contain; and was a

mere guess as to the verdict of a jury which was evidently having difficulty. It can not be said that this article so prejudiced the minds of the jury as to justify a reversal.

As to the talk of the jurors with Swayne, it clearly appears that nothing was said about the trial. This could have had no effect upon their verdict.

E. *The conduct of the district attorney was free from error.*

1. The statement, in the district attorney's closing, that the defendants hated Stanley, was proper argument.

The theory of the district attorney was that the Indians had determined to get rid of Stanley as superintendent; and he argued that they intended by humiliation, ignominy, and force to drive him off the reservation. In his argument, after referring to the unexpected interference of the policeman and the shooting of him by Apapas, the district attorney continued that Apapas then turned to the man "they hated and had planned to malign and abuse, and seeing him there, went after him with his gun" (248, 249).

Counsel objected that the evidence did not justify the statement that these men hated Mr. Stanley and said, "And we take exception to that remark."

In the cases cited by defendants, the prosecuting attorney made a positive statement of fact which was not in evidence. In the present case we think the district attorney's argument was amply supported by evidence. But his statement was not

one of fact. It was mere argument from the evidence already introduced.

The rule is settled that the maintenance of the propriety of a logical inference from facts in evidence is not in itself the offering of evidence, but is always the function of counsel. His desired inferences may be forced, unnatural, and untenable, but he may, nevertheless, urge them to a jury, and it is for them to determine whether his deductions are correct. (3 Wigmore, Evidence, sec. 1807 (3); *Coombs* v. *State*, 75 Ind., 216; *State* v. *Moore*, 32 Oreg., 65.)

That in the present case the district attorney's remark was purely argument appears from the discussion following the objection. The court directed the jury to disregard any statement outside of the testimony and to be guided solely by that; the district attorney said that his statement was argument and purely a matter of the construction of the evidence (249).

It is to be further remarked that upon the conclusion of the discussion the defendants were apparently satisfied with the court's action. No exception was finally taken, nor was the court requested to discharge the jury. The point is waived, therefore; the defendants elected to take their chance of acquittal. (See *Lorenz* v. *United States*, 24 Ap. Cas. D. C., 337, 391.)

2. The question to Calisto Tortes was proper cross-examination.

This witness testified that he remained inside the schoolhouse when the other Indians left the room.

He was asked on cross-examination why, and replied he was scared to go out (197). The district attorney endeavored to show that the witness knew something was going to happen and had remained inside to avoid seeing it. The witness then explained his previous statement by saying that he was not scared until after the shooting; that he did not leave the room when the other Indians started out because it was crowded around the door.

He was then asked—the question complained of—whether he did not know when he went into the room that it was planned that the witness and certain others should stay inside the room and that Leonicio Lugo should go outside of the gate, so they would not see what happened.

The question is objected to as assuming a state of facts not in evidence (197).

The question was substantially whether a certain plan did not exist. It was in no sense a statement of fact by the district attorney, but simply an attempt to get a hostile witness to testify to what the examiner had reason to believe was the fact.

The method of such an examination is largely in the discretion of the trial court, and that discretion was not abused here.

It is submitted that this case must be dismissed for want of jurisdiction or the judgment affirmed.

JESSE C. ADKINS,
Assistant Attorney General.

MARCH 30, 1914.

APPENDIX.

Section 328, Penal Code. All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault within tent to kill, assault with a dangerous weapon, arson, burglary, and larceny, within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases. And all such Indians committing any of the above-named crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States: *Provided*, That any Indian who shall commit the offense of rape upon any female Indian within the limits of any Indian reservation shall be imprisoned at the discretion of the court. (35 Stat., 1151.)

In the Supreme Court of the United States

OCTOBER TERM, 1913

AMBROSIO APAPAS, CORNELIO LUBO, Francisco Lubo, et al., plaintiffs in error,

v.

THE UNITED STATES.

No. 746.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF OF DEFENDANTS ON MOTION TO DISMISS

On behalf of the defendants we contend that, granting that the argument of the solicitor general in his brief on motion to dismiss is good on all points argued therein except the last one, to-wit, point Four, involving assignment of error 36, still on this point the supreme court can take jurisdiction of this case on the ground that the defendant, Apapas' immunity, from self-incrimination guaranteed under the fifth amendment to the constitution, was violated. In the case of *Cincinnati etc. vs Thiebaud*, 177 U. S. 615, the following language is used: "When

our jurisdiction is invoked under section five of the judiciary act of March 3rd, 1891, (now Section 238 Judicial Code) on the ground that the case follows within the fourth, fifth or sixth of the classes of cases therein enumerated, it must appear that a title, right, privilege, or immunity was claimed under the constitution, and a definite issue in respect to the possession of the right must be distinctly deducible from the record;—and it is not sufficient that the point is raised in the assignment of errors. (Citing cases therefor.)" This point is brought to the supreme court under subdivision four of section five of said act of March 3rd, 1891, (now section 238 Judicial Code) which subdivision reads as follows: "In any case that involves the construction or application of the constitution of the United States." It is true that this question is not certified, but since the allowance of the writ of error is general, the following language used in the case of *Chapell vs. the United States*, 160 U. S. 499, is applicable to the present case. Said language is as follows: "But no question of jurisdiction having been separately certified or specified, and the writ of error having been allowed without restriction or qualification, this court, under the other clause of the statute above cited, has appellate jurisdiction of this case as one in which the constitutionality of a law of the United States was drawn in question; and, having acquired jurisdiction under this clause, has the power to dispose, not merely of the constitutionality of the question, but of the entire case, including all questions, whether of jurisdiction or of merits. (Citing cases therefor.)"

In this case last mentioned the constitutionality of a law of the United States was drawn in

question, whereas in the present case the construction or application of the constitution of the United States is involved and in either case the supreme court acquires jurisdiction as was held in *Cincinnati etc. vs. Thiebaud*, supra. The 36th assignment of error is not based on the hearsay rule as maintained by the solicitor general, but as shown by the record, is based on the ground that no proper foundation for a confession was laid. And now we proceed to show how the construction or application of the constitution of the United States was drawn in question in this case by the defendant's immunity from self-incrimination guaranteed by the constitution having been violated.

On the direct examination of J. F. Durlin, a Deputy United States Marshall in and for the southern district of California, who was a witness for the prosecution, after testifying that he was in the sheriff's office at Riverside, California, on the 6th of May, 1912, in the presence of Sheriff Wilson and Deputy Sheriff Nelson and Gabe Costa, and two of the defendants, Ambrosio Apapas and Francisco Lubo and no others, was asked the following questions and made the following answers: (Testimony of J. F. Durlin R. 166).

Q. Now, when you went there to the sheriff's office, and all of these persons were present, did you have any conversation?

A. Yes sir.

Q. That gun was there, was it, in the room?

A. Yes sir: It was brought in at my request———.

Q. Was this gun shown to the defendant Apapas?

A. It was.

Q. Was there any question asked him?

A. Yes sir.

Q. What was the first thing that was said in the conversation with Apapas?

A. I asked him if he ever saw that gun before.

Q. What did he say, if anything?

A. He answered me back——.

Mr. Johnstone: One minute. We object that there is no proper foundation laid for a confession; there is no evidence to show that there was any inducement or immunity offered, or what the circumstances were under which the statements were made.

Mr. Robinson: We do not intend to prove that there were any inducements offered, your honor, but I understood counsel the other day objected to my method of proving that, so in order to meet his objection and start with a clear sheet, I adopted what I did not think was the correct method, of simply asking what happened, and if anything objectionable comes up, counsel can object to it.

The Court: I think perhaps the foundation was laid the other day for the transaction. I will overrule the objection.

Exception taken.

Q. What did he say, if anything?

A. He said yes, that he had seen the gun before.

Question by Mr. Robinson: In what language did he say that?

A. He answered first, and I asked the direct question, I said: Did you ever see this gun before? And he understood what I was saying, and he said "Si," and that is Spanish for "Yes," and then through the interpreter———.

Mr. Estudillo: Just a minute. I move to strike out what this witness gives as his opinion.

Mr. Robinson: That he understood what he said—those words "He understood what I said" may be stricken out, of course.

A. He answered "Si," which is "Yes" in Spanish. Then through the interpreter the question was put to him and he answered———.

Mr. Johnstone: Just a minute. We object to the answer of the interpreter.

Mr. Robinson: I have stopped the witness. It is not necessary to take up time.

Q. When the gun was shown to him and these questions were asked did the defendant Apapas look at the gun?

A. Yes sir.

Q. And did he make any motion or gesture at all toward the gun?

A. Yes sir.

Q. What was it?

A. (indicating) "Si."

Q. Now, I show you six shells, four empty and two loaded cartridges, being United States exhibit 6 for identification, and ask you to look

at those and see if there are any marks on them by which you can identify them.

A. Yes sir.

Q. You recognize marks on each of them, do you?

A. Yes sir.

Q. Who make those marks?

A. I did.

Q. Where?

A. In the grand jury room.

Q. Federal grand jury room?

A. Yes sir.

Q. Up to the time that you made those marks on those shells in the grand jury room, in whose possession had they been?

A. They had been in my possession.

Q. From whom did you get those shells and gun?

A. Sheriff Wilson of Riverside.

Q. On this occasion of which you have testified?

A. Yes sir.

Q. Are they in the same condition, with the exception of the marks you put on them, as when you got them from Sheriff Wilson?

A. Just the same.

Q. Did you mark the two cartridges?

A. Yes sir.

Q. Did you make this cross-cut on the head of each one of those bullets?

A. Yes sir.

Q. When you received them were those bullets in the gun?

A. They were in the gun.

Mr. Robinson: We offer them as United States exhibit 6.

Mr. Johnstone: They are received in evidence solely as being cartridges taken from the gun without any reference to the position they were in the gun.

Q. By Mr. Robinson: Mr. Durlin, do you remember in what order those cartridges, loaded and unloaded, were in the gun?

A. To the best of my recollection now there were four empties and two loaded. That is the way they ran.

Q. Right in sequence?

A. Right in sequence.

Q. You don't know which loaded one was to the left or which was to the right, but they were in a circle?

A. I do not.

Q. They were all in a circle, were they?

A. All in a circle.

The testimony above set forth shows what the witness Durlin answered over the objection of the defendants, that no proper foundation had been laid for a confession and that same was not shown to be voluntary.

In the case of the *People vs. Quan Gim Gow*, Vol. 17 Cal. App. Dec., page 786, 789, it is

stated, "The fact that the questioning was done by police officers presents an important item for consideration in determining whether the admissions extracted were of a voluntary character. As is said in *Bram vs. United States*, 168 U. S. 540: 'Whatever be the rule in this regard in England, however, it is certain that where a confession is elicited by the questions of a policeman, the fact of its having been so obtained it is conceded may be an important element in determining whether the answers of the prisoner were voluntary. The attempt on the part of a police officer to obtain a confession by interrogating has been often reproved by the English courts as approaching dangerously near to a violation of the rule protecting the accused from being compelled to testify against himself.'"

The case of *Bram vs. United States*, 168 U. S. 532, establishes as shown by the syllabi the following propositions:

1. Where a conversation with the accused is offered in evidence as a confession, and is admissable only as a confession, the measure of proof resulting from it is not to be considered in determining its admissibility.

2. The use which was made of the prisoner's statement precludes the state from saying that it was not used to his prejudice.

3. The prosecution cannot offer illegal evidence to prove guilt, and then, for the purpose of avoiding the consequence of its wrongful admission, be heard to assert that the evidence was not prejudicial because it did not tend to prove guilt.

4. A confession which is not voluntary is not admissible in evidence under the Fifth

Amendment to the Federal Constitution, declaring that no person shall be compelled in a criminal case to be a witness against himself.

5. The voluntary character of an alleged confession depends on the question whether the making of the statement was voluntary and without inducement or compulsion, and not whether the particular communications contained in it were voluntary or not.

6. The mere fact that a confession is made to a police officer while the accused is under arrest, in or out of prison, or is drawn out by his questions, does not necessarily render the confession involuntary; but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements made by the prisoner are voluntary.

Therefore we maintain that the constitutional right of the defendant Apapas not to be compelled to incriminate himself, was violated by the admission and testimony of J. F. Durlin, above given when defendant was asked if he had seen the gun before and he answered "Si" meaning "Yes." The measure of proof resulting from this admission is not to be considered, as is well settled by the Bram case above cited. At the time of this confession the defendant was in the presence of the police officers mentioned above and in jail, and it was no where shown that defendant was informed through the interpreter that he did not have to answer if he didn't want to, nor was he informed of his other rights through the interpreter, nor was he informed that the admission would be used against him, all of which facts defendant thinks suffi-

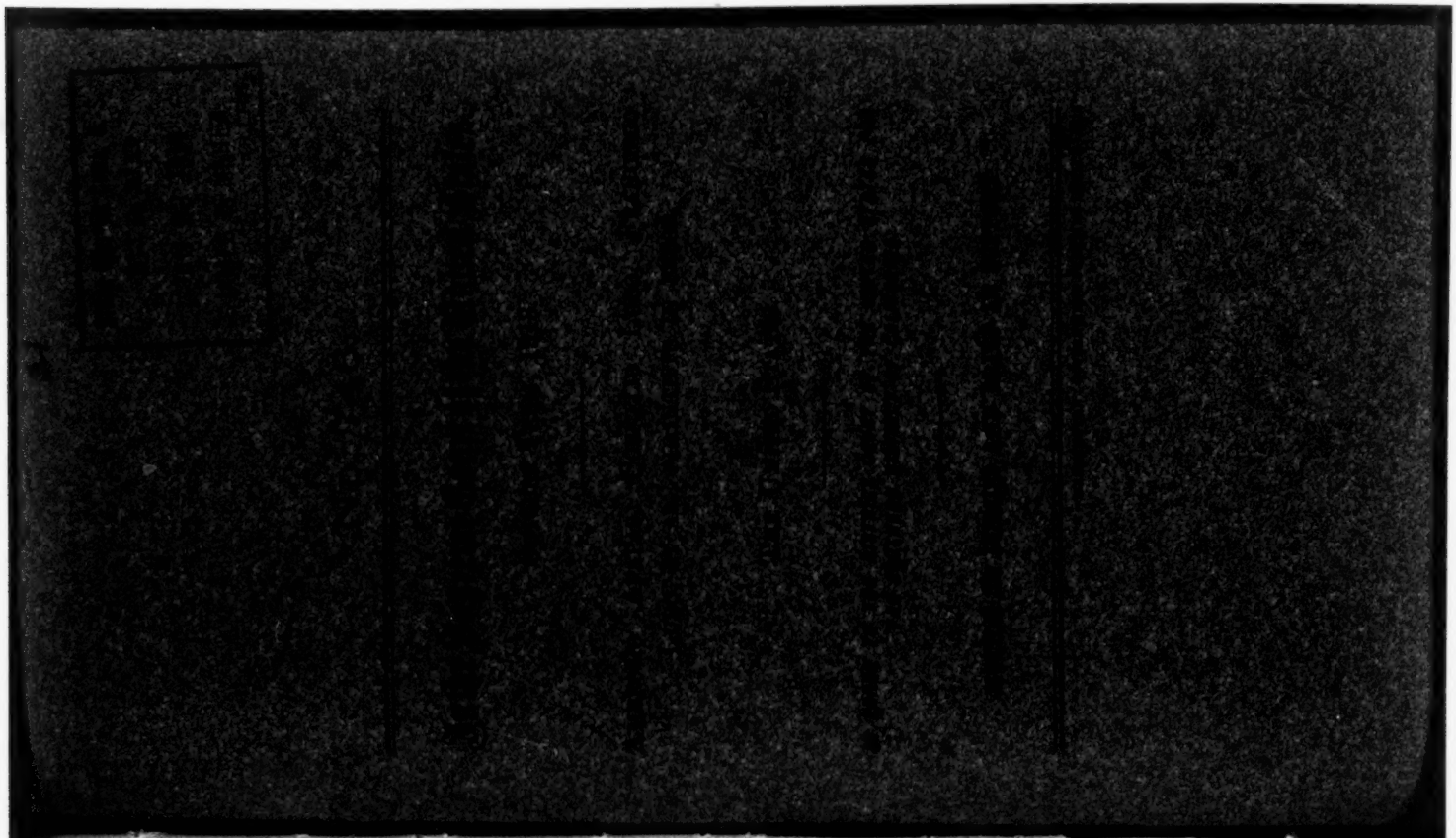
ciently show that error was committed by the court sufficient to cause a reversal of this case, and therefore this appeal should not be dismissed.

THEODORE MARTIN and

MIGUEL ESTUDILLO,

Attorneys for Defendants.

January, 1914.



In the Supreme Court of the United States.

OCTOBER TERM, 1913.

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No. 746.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

MOTION TO DISMISS AND BRIEF IN SUPPORT.

The Solicitor General, on behalf of the United States, moves that this writ of error be dismissed.

The indictment charged the murder of a white man by Indians on May 2, 1912, within the limits of the Cahuilla Indian Reservation in the State of California, a district and country under the exclusive jurisdiction of the United States, in violation of sections 273, 275, and 328 of the Criminal Code. Plaintiffs in error were found guilty in the second degree and sentenced to 20 years' imprisonment.

There are 100 assignments of error. Several of these relate to the court's refusal to give an instruc-

tion requested by defendants, to its denial of defendants' motion for a new trial, its denial of the motion to direct a verdict for defendants on the ground that the court had no jurisdiction since defendants were citizens of the United States, to the rendition of judgment because of lack of jurisdiction of defendants' persons, and to the imposition of sentence because defendants were not proven to be Indians and wards of the Government. The remaining assignments, 95 in number, relate to rulings on the evidence.

None of these assignments is sufficient to confer appellate jurisdiction on this court.

1. In view of the verdict, the case is not a capital one (*Rakes* v. *United States*, 212 U. S. 55); so even if this court's review of such cases had not been transferred to the Circuit Courts of Appeals by the Judicial Code, sections 128 and 238, no writ of error would lie on this ground.

2. The question of the trial court's jurisdiction is not certified—a fatal objection to its consideration here as a basis for the present writ. *Ansbro* v. *United States*, 159 U. S. 695; *Chappell* v. *United States*, 160 U. S. 499.

3. The 63d assignment of error attacked the denial of defendants' motion for a directed verdict, on the ground that the district court had no jurisdiction, as the defendants were citizens of the United States, their ancestors were citizens of the Republic of Mexico, and by virtue of the treaty of Guada-

lupe Hidalgo became citizens of the United States (R. 441). The motion in question alleged further that by virtue of the act of Congress admitting California to statehood the defendants became citizens of the State of California, and that they had severed and given up all tribal relations (R. 246–247). It was not questioned, however, that defendants were Indians of the Cahuilla tribe and lived on the reservation.

The court admitted evidence relating to the tribal organization of the Cahuilla Indians (R. 248–260), and held that under the treaty a few Indians in the ceded territory became citizens of the United States, but the great body of them did not; that the question in any particular case was a political one; that as the President had established a reservation for these Indians and placed an agent over them, his action in that regard was controlling upon the court—citing *United States* v. *Joseph*, 94 U. S. 614, and *United States* v. *Kagama*, 118 U. S. 375, (R. 260–261).

There is no constitutional or treaty question here presented. According to the view of the trial court the construction of the treaty was not involved, since the question of defendants' citizenship was a political one. Whether this view as to citizenship was erroneous or sound, it does not affect the judgment, since this court has decided that the very statute on which this indictment was founded (Criminal Code, sec. 328) applies to tribal Indians

regardless of their citizenship. *United States* v. *Celestine*, 215 U. S. 278.

Whether or not defendants meant to assail the constitutionality of this statute, they did not do so in terms; and this in itself should suffice to prevent them from raising the question here. *Ansbro* v. *United States, supra; Muse* v. *Arlington Hotel Co.*, 168 U. S. 430; *Paraiso* v. *United States*, 207 U. S. 368. But assuming that the question was properly raised below and appears of record, its discussion is foreclosed by *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *United States* v. *Rickert*, 188 U. S. 432; *United States* v. *Celestine, supra; Hallowell* v. *United States*, 221 U. S. 317; *United States* v. *Sandoval*, decided on October 20th of the present term. This destroys it as a foundation for the present writ of error. *Rakes* v. *United States*, 212 U. S. 55; *David Kaufman & Sons Co.* v. *Smith*, 216 U. S. 610.

4. The 36th assignment of error is based on defendants' objection to a question put to the deputy United States marshal, a witness for the prosecution, concerning a statement made by defendant Apapas after the crime. The witness, with a warrant for the arrest of Apapas, was in the office of the sheriff who had Apapas in custody, and had the latter brought before him. The gun with which the murder was committed was shown Apapas; witness asked him "if he ever saw that gun before." Apapas answered "Si" (yes). This testimony was objected to "on the grounds that no proper

foundation was laid for a confession, as there is no evidence to show that there were not any inducement or immunity offered " (R. 166). As a matter of fact such foundation had been laid in the previous testimony of the sheriff, who testified regarding that conversation in his office that to the best of his recollection there was no conversation with Apapas prior to the question; that no gestures were used toward Apapas; that he was not in shackles, and that no one had hands on him. Defendant thereupon objected to the statement of the question and answer by the sheriff on the ground that the question as asked of the defendant by the interpreter, through whom the conversation was conducted, should be introduced to determine whether or not a hope of reward or immunity had been held out or threats or duress used. This objection was overruled and defendant excepted (R. 93–95; *cf.* 98–100). It is apparent, therefore, that assignment 36 is a mere variation of the earlier exception based on the hearsay rule, and has nothing to do with defendants' immunity from self-incrimination under the Fifth Amendment to the Constitution.

A careful examination of the record has failed to reveal any other alleged errors even colorably within the cognizance of this court under section 238 of the Judicial Code. The writ of error should therefore be dismissed.

JOHN W. DAVIS,
Solicitor General.

DECEMBER, 1913.

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